In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 470

LAWRENCE J. CONVERSANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1969. On August 13, 1969, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper to preclude petitioner from inquiring whether the person who had introduced petitioner's co-defendant to the government agent was an informant.

2. Whether the instruction on entrapment, to which no objection was made at trial, constituted plain error.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on two counts of an indictment which charged that he and William P. Keohan sold and transferred (Count 1), and possessed and concealed (Count 2), 6,399 counterfeit ten dollar bills, in violation of 18 U.S.C. 473, 472. On March 19, 1968, he was sentenced to concurrent terms of four years' imprisonment on each count.

The evidence showed that Secret Service Agent Balge posed as a vice-president of a District of Columbia bank who had embezzled $200,000 and needed to buy counterfeit money in quantity in order to substitute it for the money supposedly taken (App. S. 25-27).[1] One O'Donnell introduced co-defendant Keohan to Agent Balge (App. S. 12, 28, 35). Upon

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[1] "App. S." refers to the one volume "Appellant's Supplemental Appendix" which contains the record of the examination of the witnesses, while "App." refers to petitioner's appendix which contains a portion of the trial court's instructions; both volumes are on file with the Clerk of this Court.

being informed of Balge's story, Keohan contacted Kittelt, a person known to Keohan as involved in counterfeit money operations (App. S. 40).

On May 27, 1966, Agent Balge registered in the Robert Treat Hotel in Newark, New Jersey while Kittelt, Keohan, and petitioner travelled together from Baltimore to Newark (App. S. 11-12, 56). Once there, petitioner received information from someone, not identified at the trial (App. S. 57, 72), that the Robert Treat Hotel was considered too dangerous for a counterfeit transfer. Petitioner went to the hotel, met Agent Balge for the first time, and told Agent Balge that they wanted him to leave and go to another hotel (App. S. 62). Balge demurred, pointing out that he had not seen any counterfeit money as yet and did not wish to risk loss of his genuine money by moving (App. S. 14). Petitioner thereupon displayed a sample counterfeit ten dollar bill (App. S. 15). Agent Balge nevertheless refused to leave the hotel. The next morning, after further unsuccessful efforts were made by petitioner to have the place of the transfer changed, it was agreed that the "deal would go through" (App. S. 62). Shortly thereafter, petitioner returned to the hotel, and handed Agent Balge a large shopping bag containing $63,990 in counterfeit tens. Agent Balge then arrested petitioner and Keohan (App. S. 15-19).

At trial, Agent Balge was asked if O'Donnell, the person who introduced him to Keohan, was a paid informer. After a prosecution objection to the question had been sustained, the defense stated for the record that the question was necessary to show that

O'Donnell entrapped Keohan "who in turn entrapped Conversano" (App. S. 32-34). Later, Keohan, who appeared as a defense witness, testified that the line of introduction or acquaintance went from O'Donnell to Keohan to Kittelt to petitioner. Kittelt was the one who contacted petitioner and later introduced petitioner and Keohan, to each other (App. S. 35-40). Keohan testified that, when petitioner was initially asked to join him and Kittelt in furnishing the counterfeit money, petitioner "wasn't enthusiastic" as he claimed he did not need the money, but that he later agreed to assist, and was to receive a third of the money paid by the purchaser (App. S. 45-46).

ARGUMENT

1. Petitioner's defense of entrapment was not hampered by the exclusion of the inquiry as to O'Donnell's status, *i.e.*, whether he was a volunteer or a paid informant of the Secret Service (Pet. 4-5). Petitioner had had no dealings with O'Donnell who simply introduced Agent Balge to Keohan. Keohan, in turn, also had to use an intermediary, Kittelt, to meet petitioner. Since Keohan testified as a defense witness but never claimed that O'Donnell had entrapped him, nor that he, Keohan, had entrapped petitioner, there is no factual basis for petitioner's present claim as to the significance of O'Donnell's status. Petitioner's own testimony was that his accomplices, Kittelt and Keohan, were the ones who overcame his initial reluctance and made the transaction with the "bank official" seem attractive to him (App. S. 52-55). Thus, neither Keohan nor petition-

er claimed that O'Donnell had in any way been guilty of personal importuning or coercive tactics which may have given support to the claim of entrapment.

2. In instructing the jury the court said:

> "Entrapment occurs * * * when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense in order to induce its commission in order that they may prosecute it. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary and innocent and the trap for the unwary criminal * * *" [App. 10a].

The trial court did not instruct that the burden was on the government to establish that entrapment had not occurred, nor was there a request for such a charge (Pet. 5, 13a). Petitioner now asserts that this omission by the trial court was plain error (Pet. 5).

It has been held that the burden is on the government to prove beyond a reasonable doubt that the defendant was not entrapped, and that it is prejudicial error to fail to give such an instruction in a close case where the issue of entrapment was raised. *Notaro* v. *United States*, 363 F.2d 169, 173 (C.A. 9); *United States* v. *Landry*, 257 F.2d 425, 430 (C.A. 7). However, in the absence of a request or an objection to the charge given, the failure to instruct as to the burden of proof has been held not to be prejudicial, the matter being deemed to have been covered by the general charge on the burden of proof. *United States*

v. *Salas*, 387 F.2d 121 (C.A. 2), certiorari denied, 393 U.S. 863; *Harrington* v. *United States*, 391 F.2d 604 (C.A. 5); *Hart* v. *United States*, 396 F.2d 243, 246 (C.A. 8), certiorari denied, 393 U.S. 1033; *Nordeste* v. *United States*, 393 F.2d 335, 339-340 (C.A. 9), certiorari denied, 393 U.S. 878.

In the present case, where the only issue was entrapment, the general charge as to the burden of proof adequately covered the subject. *Nordeste* v. *United States*, *supra*, 393 F.2d at 339-340. Moreover, the evidence as to entrapment was not close since petitioner testified that such urgings as he was subjected to prior to the start of the criminal venture emanated from his accomplices. Thus, there was no "plain error" warranting reversal. See *Lopez* v. *United States*, 373 U.S. 427, 436.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1969.

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